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A BRIEF SURVEY OF EQUITY JURISDICTION.[1]

IV.

IT may have occurred to the reader to ask why the jurisdiction exercised by equity over contracts and other obligations is designated as specific performance, since equity always exercises its jurisdiction by compelling performance, and always makes such performance as specific as it is practicable to make it, and

[1] Continued from Vol. I., p. 387.

In discussing, in the preceding article (p. 377, n. 2), the effect of an agreement to convey property, in changing the equitable ownership of the property agreed to be conveyed, the writer had his mind entirely upon bilateral agreements for the purchase and sale of property, and it did not occur to him to call attention to the difference, in respect to the question under discussion, between such agreements and a unilateral agreement to convey property. It seems that an agreement of the latter kind, *i.e.*, an agreement to convey property already paid for (see Rayner *v.* Preston, 14 Ch. D. 297, 18 Ch. D. 1), would have the effect of changing the equitable ownership of the property immediately, by making the vendor a trustee for the vendee; and, therefore, any subsequent injury to the property by the act of God would fall upon the vendee. The latter has parted with his money, and he has acquired nothing in exchange for it but a right to a conveyance of the property. If the vendor be ready and willing to execute such conveyance in proper form, that is all that the vendee can require of him; and the fact that, since the payment of the money and the making of the agreement, the property has been injured by the act of God will not enable the vendee either to recover back his money, or to recover damages for a breach of the agreement. A bill to compel the performance of such an agreement has indeed the characteristics of a bill by a *cestui que trust* against a trustee, rather than of a bill for the specific performance of a contract.

since the performance which equity enforces, in cases of contracts and other obligations, is no more specific than it is in other cases. The answer to this question seems to be that the term "specific performance" is used, not to indicate the nature of the relief given by equity, but to indicate the reason and the object of the jurisdiction assumed by equity, — the reason being that a compensation in money is an inadequate remedy, and the object therefore being to afford a remedy by way of specific performance or specific reparation. In other words, the term "specific performance" is used, not to indicate that the relief given by equity in such cases differs from the relief which equity gives in other cases, but to mark the distinction between the relief given by equity and the relief given at law in such cases. Accordingly, when (as is often the case) equity assumes jurisdiction over contracts and other obligations, not because a compensation in money is an inadequate remedy for a breach, but for some other reason, — when in fact the relief given is the same in equity as at law, namely, a compensation in money, — the jurisdiction is never designated by the term "specific performance."

The preceding article comprised all that it was proposed to say upon the subject of specific performance; but it remains to speak of three important classes of cases in which equity assumes jurisdiction over contracts or other obligations, and yet gives no other relief than a compensation in money; namely, first, bills for an account; secondly, bills in the nature of an action of assumpsit, or bills of equitable assumpsit; thirdly, creditors' bills, *i.e.*, bills filed by creditors of persons deceased against the executors or administrators of the debtors to compel the payment of the debts.

Bills for an Account.

Every bill for an account must be founded upon an obligation to render an account. What then is the nature of such an obligation, and when does it exist? In strictness this question does not belong to the subject of these articles; but the obligation to render an account is so little understood, that a knowledge of it cannot properly be assumed. It was formerly well enough understood by common-law lawyers, but, with the disuse of the action of account, nearly all knowledge of it has been lost by them. It might be supposed that what common-law lawyers ceased to know in this regard, equity lawyers

would have learned; but such is not the fact. Partly from an indisposition among equity lawyers to study common-law learning, which common-law lawyers regard as obsolete, and partly for another reason, the obligation to account has never been well understood by equity lawyers. The other reason is the wide, indeterminate, and vague sense in which the term "account" has always been used in equity. It has been usual to call all bills in equity which may involve a reference to a master to take an account of any kind or for any purpose (and such bills are many in number and very diverse in character) bills for an account, especially as often as it has been found necessary to give them that name in order to sustain them in point of jurisdiction; and the fact has not been recognized that such bills are true bills for an account only when they are founded upon a legal obligation to render an account, and that in all other cases they rest upon some other principle in point of jurisdiction.

The obligation to render an account is not founded upon contract, but is created by law independently of contract. Of course there may be in terms a promise or a covenant to render an account, or a bond may be upon the condition that the obligor render an account, and such promise,[1] covenant,[2] or bond[3] may support an action at law, but neither of them will ever create an obligation to account, any more than a promise to pay a definite sum of money will create a debt; for if the facts from which the law raises such an obligation do not exist, the obligation will not exist, notwithstanding such promise, covenant, or bond; and if such facts do exist, the law will raise the obligation to account independently of the promise, covenant, or bond, and the latter will be entirely collateral to the former.[4]

What then are the facts which must exist in order to induce the law to raise an obligation to account? First, the person upon whom such an obligation is sought to be imposed (and whom we will call the defendant) must have received property of some kind not belonging to himself; for otherwise he will have nothing to

[1] Spurraway *v.* Rogers, 12 Mod. 517; Wilkin *v.* Wilkin, 1 Salk. 9, 1 Show. 71, Comb. 149, Carth. 89; Owston *v.* Ogle, 13 East, 538; Topham *v.* Braddick, 1 Taunt. 572.

[2] Barker *v.* Thorold, 1 Wms. Saund. 47.

[3] Vere *v.* Smith, 2 Lev. 5, 1 Ventr. 121; Anon. 1 L. P. R. (1st ed.), 32.

[4] 1 Rol. Abr., Accompt (A), pl. 5, 8; Hawkins *v.* Parker, 2 Bulstr. 256, 1 Rol. Abr., Accompt (A), pl. 15, 1 Rol. Rep. 52; Anon., Dyer, 51, pl. 14. See Bro. Abr., Accompt pl. 60.

account for or to render an account of. At common law there are only three classes of persons who can incur an obligation to account; namely, guardians, bailiffs, and receivers; and a guardian, a bailiff, or a receiver is a person who receives property belonging to another. As to a guardian or a receiver this is obvious; and it is equally true as to a bailiff. Indeed, "bailiff" has the same derivation and the same meaning as "bailee," each of them signifying a person to whom property is bailed or delivered.

If such be the rule at common law, of course the rule in equity must be the same in substance; for it is the common law that creates the obligation, the enforcement of it being alone the function of equity. It is not, indeed, necessary in equity to describe a defendant as a guardian, a bailiff, or a receiver, in order to maintain a bill against him for an account; nor is it necessary to show that he is one of these rather than another; but it is indispensable that he have in truth the qualities of one, of two, or of all three of these classes of persons.

The distinctions between a bailiff and a receiver are important. A receiver is one who receives money belonging to another for the sole purpose of keeping it safely and paying it over to its owner. If the thing received be anything else than money, the receiver is a bailiff; and so he is, though the thing received be money, if he have any other duty to perform respecting it than that of keeping it safely and paying it over, — if, *e.g.*, he be bound to employ it for the profit of its owner; and hence the rule that a receiver *ad merchandisandum* is a bailiff.[1] Moreover, whether a person be accountable for property as a bailiff or as a receiver depends upon the original receipt, and not upon the state of things existing at the time when the question arises. Therefore, one who has received property as a bailiff is still a bailiff, though the property have all been converted into money, and the only duty remaining be to pay the money over to its owner.[2] In short, "once a bailiff, always a bailiff" is the rule.

The term "bailiff" is not in popular use in this country; and even in England its popular use, as applied to persons who are

[1] 1 Rol. Abr., Accompt (O), pl. 4, 5. "If a writ be against the defendant as receiver, a declaration upon a receipt *ad merchandisandum*, for which he is chargeable as bailiff, is not good." Com. Dig., Accompt (E. 2).

[2] 1 Rol. Abr., Accompt (F), pl. 2, 3; Bro. Abr., Accompt, pl. 53.

under an obligation to account, is confined to persons who have charge of land belonging to others, and who are accountable for the rents and profits of such land.[1] Still, in law, both in England and in this country, every factor or commission-merchant is a bailiff in respect to the goods consigned to him for sale.[2]

Secondly, the person seeking to impose the obligation (and whom we will call the plaintiff) must be the owner of the property in respect to which the obligation is sought to be imposed. In other words, ownership by the plaintiff must concur with possession by the defendant. Until these two things co-exist, the obligation to account cannot exist; and when they cease to co-exist, the obligation to account will cease to exist. If, therefore, the property be received by the defendant under such circumstances that it becomes his own the moment he receives it, though it belonged to the plaintiff up to that moment, no obligation to account will ever arise. Thus, when the defendant receives money belonging to the plaintiff, but receives it under such circumstances that he has a right to appropriate it to his own use, making himself a debtor to the plaintiff to the same amount, and the defendant exercises such right, the receipt of the money will create a debt,—not an obligation to account. So if the plaintiff's title to the property be transferred to the defendant, after the latter has received it and become accountable to the plaintiff for it, the defendant's accountability for the property will from that moment cease. Thus, if the defendant sell property as the plaintiff's factor, receive the proceeds of the sale and appropriate them to his own use, debiting himself with their amount, his accountability will thereupon cease, provided he had a right to do what he has done; and he will thenceforth be a debtor only; *i. e.*, he will be accountable up to the moment when the property became his, and from that moment he will cease to be accountable and will become a debtor.

Thirdly, the defendant must not receive the property as a *mere* bailee. If, therefore, the property consist of land or of goods, the defendant must receive it either for the purpose of converting it into money by sale, or for the purpose of employing it in such a way that it may yield a profit or income for the benefit of the owner.

[1] And this popular meaning seems to have once been the legal meaning. See 1 Vin. Abr., Account (X), pl. 1; Anon., Keilw. 114, pl. 51.

[2] See Godfrey *v.* Saunders, 3 Wilson, 73, where a factor was sued and declared against as a bailiff.

When the property consists of goods, a sale is the more common object of the defendant's employment; when it consists of land, the more common object is the receipt of the rents and profits. When the object is a sale, the defendant is accountable for the *corpus* of the property received; when the object is the receipt of the rents and profits or other income, the defendant is accountable only for the latter. When the object is a sale, the only measure of the defendant's accountability is the property received by him; when the object is the receipt of the rents and profits or other income, the defendant's accountability is measured by the length of time that his employment has continued, as well as by the property received by him.

If the property received consist of money, the defendant must not be bound to restore to the plaintiff the identical coin received by him; for, if he is, he will be a mere bailee, *e. g.*, if the money be sealed up in a bag.[1] So he must not, as has been seen, have a right to appropriate the money received to his own use, for then he can be only a debtor. But he must receive the money either to keep for the plaintiff, or to employ for the plaintiff's benefit; and yet his obligation must be capable of being discharged by returning to the plaintiff (not the identical money received, but) any money equal in amount to the sum received. For money cannot possibly be employed so as to yield a profit or income, without losing its identity; and though it may be so kept as to preserve its identity, yet the duty of so keeping it will, as has been seen, make the keeper a mere bailee. Moreover, such a mode of keeping money is very unusual, and such a mode of keeping another person's money would presumptively be very improper, for the recognized mode of keeping money is to deposit it with a banker; and yet by so depositing it its identity is lost, for the

1 "If one receive to my use money sealed up in a bag, as my servant, account does not lie against him." F. N. B. 116 Q, n. (d). "If £40 is delivered to render account, account lies well; but if it is delivered to re-bail when defendant is required, account lies not, but detinue." Bro. Abr., Accompt, pl. 51. "If money be delivered to render an account, account lies; but if it was delivered to keep until the plaintiff shall require it, account doth not lie, but detinue." Brownl. 26. "In account as receiver, it is a good plea in bar that the money was delivered to him to carry to London to a Lombard, to make exchange, and to receive letters of exchange, and to send them to plaintiff, which he had done accordingly. For this is equivalent to saying that he never was his receiver to render account; for this was delivered to him to exchange, and not to render account." 1 Rol. Abr., Accompt (M), pl. 7. Compare 1 Rol. Abr., Accompt (N), pl. 14. See, also, F. N. B. 119 D, n. (d).

moment it is deposited it becomes the property of the banker, the latter becoming indebted to the depositor in the same amount.

It will be seen, therefore, that in respect to the question under consideration, money differs from land or goods in at least three particulars: first, a receiver of money frequently becomes a debtor instead of a bailee, though the object for which he is made receiver is safe custody merely, as in the case of a banker; secondly, a receiver of money, not being a banker, may be, and commonly is, accountable for the money received, though he receive it for safe custody merely, because, though not a debtor, yet he is not bound to preserve the identity of the money received; thirdly, a receiver of money, if accountable at all, is always accountable for the *corpus*, since it is impossible that a receiver of money should be bound to return the identical money received, and yet be bound to account for profits made by employing the money.

One who receives money for which he is accountable may always deposit it with a banker, and in that respect he is like one who receives money for which he becomes a debtor; but, unlike the latter, he must never mix the money for which he is accountable with his own money; and, therefore, he must always deposit the former to a separate account.

The measure of accountability in case of money received for safe custody merely is the amount of money received. The receiver is not accountable for profits, for he has no authority to employ the money.[1] Of course he is not bound to pay interest, *i.e.*, out of his own pocket; for an obligation to pay interest would imply that he is a debtor. The measure of accountability in case of money received for the purpose of employing it for the benefit of the plaintiff is the amount of money received, and also the length of time that the defendant has had it.

Fourthly, in order that one may be accountable for property, he must have received it into his possession and under his control; it is not sufficient that he merely have the custody of it as the servant of the owner.[2] Nor does this distinction depend at all

[1] In account as receiver, where he is not to merchandise, he is not to account for profit; *aliter*, if the receipt was to merchandise for then he hath a warrant to gain or lose. 1 Rol. Abr., Accompt (O), pl. 14, 15.

[2] Account "does not lie where a man has only a bare custody as a shepherd." Com. Dig., Accompt (D). "In account against a bailiff, it is a good plea that he was servant to the plaintiff to drive his plough, and had his cattle for the drawing of his plough, *absque hoc* that he was his bailiff in other manner, because he is not accountable for this occupation." 1 Rol. Abr., Accompt (L), pl. 5.

upon whether the servant be of low grade or of high grade. He may be a menial servant, or he may be the chief financial officer of a corporation, of a municipal body, or even of a sovereign State; yet, if his only possession is his employer's possession, he is not technically accountable.[1]

One need, however, have possession only of that for which he is accountable. If, therefore, one is accountable only for the rents and profits or other income of property, he need not have the legal possession of the *corpus* of that property. Indeed, a bailiff of land, as such, never has the legal possession of the land itself, but he does have the possession of the rents and profits received by him.[2] So one may be authorized to sell and convey land, and to deliver possession of it to the purchaser, without ever having possession of the land himself; and yet he will be accountable for the proceeds of such sale if he be authorized to receive them into his possession and he do receive them accordingly. In such a case, however, it seems that the obligation to account does not arise until the proceeds of the sale are received, or at least not till the sale is made.

Lastly, there must be a fiduciary relation between the plaintiff and the defendant, or, as the books of the common law express it, there must be a privity between them. This requirement disposes at once of all cases in which the defendant has acquired his possession wrongfully, or in assertion of a right to the possession,[3] or even without the plaintiff's permission, though without any wrongful or hostile intention.[4] If, however, he obtain possession on the plaintiff's behalf, and as his representative, though

[1] The subjects of larceny and embezzlement furnish good illustrations of the distinction between possession and custody. One cannot be convicted of larceny, though he may be convicted of embezzlement, in respect to property of which he has the legal possession. On the other hand, one cannot be convicted of embezzlement, though he may be convicted of larceny, in respect to property of which he has the mere custody as the servant of the owner. Commonwealth *v.* Berry, 99 Mass. 428.

[2] Though a bailiff of land is accountable only for the rents and profits of the land, and not for the land itself, yet it is not necessary, in order to render him accountable, that he should have actually received rents and profits. The reason is, that he is accountable, not only for the rents and profits actually received by him, but for what, with reasonable diligence, he might have received. To that extent, therefore, a bailiff of land is an exception to the rule that, in order to render A accountable to B, he must have received possession of property belonging to B.

[3] Anon., 1 Leon. 266.— "Account does not lie where a man claims the property." Com. Dig., Accompt (D).

[4] Tottenham *v.* Bedingfield, 3 Leon. 24, Owen, 35, 83.

without any actual authority, the plaintiff may adopt and ratify his acts, and thus establish privity between him and the plaintiff.[1] So if A collect a debt due to me, it has been held that I may elect whether I will compel the debtor to pay the debt to me, notwithstanding that he has paid it to A, or whether I will adopt the act of A, and compel him to account to me for the money collected;[2] for, though A has received the money, yet he has not done any wrong to me, as it is not my money until it is paid to me; and when no wrong is done to me, I may make a privity by my consent.[3]

If money be delivered by A to B in order that it may be delivered by B to C,[4] or if it be delivered by A to B to the use of C,[5] it has often been held that B will be accountable to C. If, however, he fail to deliver the money to C, he will be accountable for it to A.[6]

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[1] "Where a man takes upon him of his own head to be my bailiff, account lies." Bro. Abr., Accompt, pl. 8. "If a man claims to be guardian of an infant, and is not, and enters and occupies, action of waste lies, and therefore action of account, as it seems; and *contra* where he enters as trespasser. Note a difference." Bro. Abr., Accompt, pl. 93. "If a man enter into my land to my use, and receive the profits thereof, I shall have an account against him as bailiff." F. N. B. 117 A.

[2] "If a man receive the rent due from my lessee for life, or my tenants, account lies against him as receiver." 1 Rol. Abr., Accompt (H), pl. 2. "If a man receive my rent of my tenants without my assent, yet I shall charge him by the possession and by the receipt. *Per* Bryan, C. J. And so see that never his receiver to render account shall not serve in this case for him." Bro. Abr., Accompt, pl. 65; 1 Vin. Abr., Account (A), pl. 7, note.

[3] Tottenham *v.* Bedingfield, 3 Leon. 24, *per* Manwood, J.

[4] "I command you to receive my rents and deliver them to Lord Dyer, he shall have account against you; yet he did not bail the money." *Per* Lord Brooke, in Paschall *v.* Keterich, Dyer, 152, note. "If a man deliver money to you to pay to me, I shall have account for this against you." 1 Rol. Abr., Accompt (A), pl. 6; 1 Vin. Abr., Account (A), pl. 6.

[5] "A man shall have a writ of account against one as bailiff or receiver, where he was not his bailiff or receiver; for if a man receive money for my use, I shall have an account against him as receiver; or if a man deliver money to one to deliver over to me, I shall have an account against him as my receiver." F. N. B. 116 Q. "If £10 be paid to W. N. to my use, I may have account against W. N. of it." Bro. Abr., Accompt, pl. 61. And see Cocket *v.* Robston, 3 Leon. 149, Cro. Eliz. 82.

[6] "It is a good plea that it was delivered to deliver over, to whom he hath delivered it accordingly, because he was never accountable for it but conditionally; namely, if he did not deliver it over." 1 Rol. Abr., Accompt (M), pl. 2. "In account defendant said they were bailed to him to bail over to J. S., which he had done. Plaintiff said that, after the delivery to defendant, and before the delivery over, he commanded him to bail it to him; and a good replication by the best opinion; for by the delivery to the defendant, J. S. has no property in it, and therefore plaintiff may countermand it; and yet by this delivery to defendant, J. S. may have account, if it be not countermanded." Bro. Abr., Replication, pl. 65.

If A be accountable to B, and B be accountable to C, this does not make A accountable to C for want of privity. Therefore, if B be the bailiff or receiver of C, and A be the deputy of B, A will be accountable to B alone, and B will be accountable to C, just as if there were no deputy.[1]

The privity required by the common law to support an obligation to account was so strictly a personal relation that neither the right created nor the duty imposed by the obligation could be transferred even by an act of law; and hence, upon the death of the obligee, the obligation could not be enforced by his executor or administrator; and upon the death of the obligor, the obligation could not be enforced against his executor or administrator. As to the executor or administrator of the obligee, this rule was abrogated by early statutes;[2] but as to the executor or administrator of the obligor, it remained in force until the passage of the well-known act[3] for the amendment of the law in 1705. It seems, however, that equity would enforce such an obligation against the executor or administrator of the obligor even before the passage of that statute.[4]

It is worthy of observation that while the obligation to account is created by law, yet the privity without which such an obligation cannot exist is, as a rule, created by the parties to the obligation. There are, however, exceptions to that rule; for, in the case of guardians, the privity is created by law,[5] and in one class of cases it is created by the statute just referred to; namely, where one of two joint-tenants, or tenants in common, receives "more than comes to his just share or proportion."

Such then being the facts from which the law will raise an obligation to account, the next question is, How can such an obligation be enforced, or what is the remedy upon such an obligation? It

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[1] F. N. B. 119 B; 1 Rol. Abr., Accompt (E), pl. 4; The Queen and Painter's Case, 4 Leon. 32; s. c., *nom.* Sir W. Pelham's Case, 4 Leon. 114.

[2] Westm. 2 (13 Ed. I.), c. 23; 25 Ed. III., stat. 5, c. 5; 31 Ed. III., stat. 1, c. 11.

[3] 4 Anne, c. 16, s. 27.

[4] Co. Litt. 90 b, n. 5 (by Hargrave); Lee *v.* Bowler, Cas. *t.* Finch, 125; Holstcomb *v.* Rivers, 1 Ch. Cas. 127, 1 Eq. Cas. Abr. 5; Burgh *v.* Wentworth, Cary (ed. of 1650), 54.

[5] "To maintain an action of account, there must be either a privity in deed by the consent of the party, for against a disseisor, or other wrongdoer, no account doth lie; or a privity in law, *ex provisione legis*, made by the law, as against a guardian, etc." Co. Litt. 172 a,

is obvious that the only adequate remedy is specific performance, or at least specific reparation. An action on the case to recover damages for a breach of the obligation, even if such an action would lie, would be clearly inadequate, as it would involve the necessity of investigating all the items of the account for the purpose of ascertaining the amount of the damages, and that a jury is not competent to do. In truth, however, such an action will not lie.[1] If, indeed, there be an actual promise to account, either express or implied in fact, an action will lie for the breach of that promise; but as such a promise is entirely collateral to the obligation to account, and as therefore a recovery on the promise would be no bar to an action on the obligation, it would seem that nominal damages only could be recovered in an action on the promise, or at most only such special damages as the plaintiff had suffered by the breach of the promise.[2] Besides, the first instance in which an action on such a promise was sustained was as late as the time of Lord Holt,[3] while the obligation to account has existed and been recognized from early times.

Accordingly, the common law provided an action whose sole object was the enforcement of obligations to account, namely, the action of account; and the relief afforded in that action consisted in compelling the defendant to account with the plaintiff. It is true that this is a kind of relief for which the machinery and the methods of the common-law courts are very ill fitted, and which, at the present day, they never attempt to give; but they did attempt it in early times in the instance of the action of account, there being then no courts of equity. The action, unlike ordinary actions at law, consisted of two stages. The object of the first stage was to ascertain and decide whether or not the defendant was bound to account with the plaintiff; and, accordingly, to that point, the pleadings were directed. The declaration charged the defendant with being the plaintiff's guardian, bailiff, or receiver. The defendant might either deny the charge (*i. e.*, deny that he had ever been such guardian, bailiff, or receiver, and hence that he had ever incurred an obligation to account with the plaintiff), or he might plead an affirmative defence, namely, that the obligation which confessedly once existed had ceased to exist, *e.g.*, that

[1] Spurraway *v.* Rogers, 12 Mod. 517.

[2] Wilkyns *v.* Wilkyns, Carth. 89.

[3] Wilkyns *v.* Wilkyns, *supra*.

it had been extinguished by a release, or that it had been performed by an actual accounting with the plaintiff. This latter defence was set up by a plea of *plene computavit*, as it was called, *i.e.*, that the defendant had fully accounted with the plaintiff; and to establish this defence the defendant must show that he and the plaintiff had agreed upon all the items of the account, and had struck a balance; for an accounting must either be before a competent court, or by the act and agreement of the parties.

If the pleadings resulted in an issue of fact, it was tried by a jury, as in ordinary cases; if in an issue of law, it was tried by the court. If the issue was decided in the defendant's favor, a final judgment in his favor was rendered; if in the plaintiff's favor, an interlocutory judgment was rendered, namely, that the defendant do account, *quod computet*. Upon this judgment being rendered, the defendant, unless he gave bail, was committed to prison, and kept in prison until the account was taken, a final judgment rendered, and that judgment satisfied.[1]

The account was taken by auditors appointed by the court, who always consisted of two or more clerks of the court. The account commonly consisted of two classes of items, namely, items of charge and items of discharge. The former consisted of sums of money received by the defendant, and with which he was consequently chargeable. The latter consisted (besides charges for services) of sums of money paid out by the defendant on the plaintiff's account, and which were therefore to be allowed to the defendant, *i.e.*, deducted from the amount with which he would otherwise be chargeable.. The theory of these items of discharge was that they were paid by the defendant, not out of his own pocket, but out of the money in his hands belonging to the plaintiff; and hence they did not constitute independent claims in favor of the defendant and against the plaintiff, but were mere items in the account; and the only way in which the defendant could enforce them or avail himself of them, was by procuring them to be allowed in his account. And this was so, even though, as sometimes happened, the defendant's payments exceeded his receipts, so that the balance was in the defendant's favor; in which case the defendant was said to be in surplusage to the plaintiff. This would seem to show that a person subject to

[1] Robsert *v.* Andrews, Cro. Eliz. 82; Pierce *v.* Clark, 1 Lutw. 58.

an obligation to account, who had authority to make payments on behalf of the obligee, was entitled to bring an action of account against the latter, alleging that there was a balance in his favor; but this is doubtful upon authority.[1]

If the money or other property for which the defendant was accountable had been lost without his fault, he was not liable for it; and therefore proof that it had been so lost always constituted a good account.[2]

When a proper account had been taken by the auditors and delivered into court, if it showed a balance in the plaintiff's favor, a final judgment was rendered that the plaintiff recover such balance; but if the account showed a balance in the defendant's favor, all that the court could do for him was to dismiss him with costs; it could not render a judgment that he recover such balance, as it could render such a judgment only in favor of a plaintiff. Since, however, the taking of the account had converted the balance in the defendant's favor into a debt, the defendant could enforce payment of it by an action of debt[3] or of *indebitatus assumpsit.*

Are there any other common-law actions that will lie upon an obligation to account? The only other actions which it has ever been supposed would lie are debt and *indebitatus assumpsit;* but to sustain either of these actions, a debt is indispensable; and to say that an obligation to account can ever constitute a debt is a plain contradiction. An obligation to account may, indeed, be converted into a debt; and when that is done, of course debt or *indebitatus assumpsit* will lie. Thus, if a defendant, having money in his hands for which he is bound to account to the plaintiff, appropriates or converts such money to his own use, the plaintiff, if the amount of the money be definite and certain, so that no account is necessary to ascertain its amount, may adopt and sanction the defendant's wrongful act, and thus convert the defendant into a debtor;[4] and it seems that a demand

[1] F. N. B. 116 Q, n. (c).

[2] Vere *v.* Smith, 2 Lev. 5; 1 Ventr. 121.

[3] Gawton *v.* Lord Dacres, 1 Leon. 219; s. c., *nom.* Lord Dacres' Case, Owen, 23; Bro. Abr., Accompt, pl. 62, Dette, pl. 130, 182, Ley Gager, pl. 62, 65.

[4] Lamine *v.* Dorrell, 2 Ld. Raym. 1216. "If I deliver money to a man to deliver over, and he doth not, but converts the money to his own use, I may elect to have an action of account against him, or an action on my case; but a stranger hath no other remedy than an action of account." *Per* Frowyk, C. J. Anon., Keilw. 77 a, 77 b, pl. 25, Mich. 21 H. 7.

of payment by the plaintiff, and a refusal or failure to pay by the defendant, will establish a conversion, and thus enable the plaintiff, at his option, to maintain debt or *indebitatus assumpsit.* In this class of cases, therefore, the misconduct of the defendant enables the plaintiff to elect between holding the defendant to his obligation to account, and converting him into a debtor.

There is also a class of cases in which the obligor has an election to convert an obligation to account into a debt, namely, the class of cases, before referred to, in which one who has received specific property, for which he is accountable, and has converted the same into money, is entitled to appropriate the money to his own use, and does so. In such cases, however, the plaintiff is still entitled to enforce the obligation to account for the purpose of ascertaining the amount for which the defendant is liable, though it is only as a debt that he can enforce payment of the amount which the defendant has rightfully appropriated to his own use.

Of course both parties to an obligation to account may always convert such obligation into a debt, by agreeing that the obligor shall retain, as his own, the property for which he is accountable, and in exchange for it shall become indebted to the obligee in an agreed amount. In this way the obligation to account is wholly extinguished, and hence the obligee can never bring any action of account. Moreover, the parties often bring about this result without any actual intention to do so, namely, by settling the account between them, and striking a balance; for in this way the obligation to account is completely performed and extinguished; and if an action of account be afterwards brought upon it, such action may be defeated by the plea of *plene computavit.* The balance therefore necessarily becomes a debt, and can be recovered only as such. In ancient times such a balance was recovered by an action, called an action of debt for the arrearages of an account. In modern times it may be recovered by an action of debt or of *indebitatus assumpsit* upon an *insimul computassent* or account stated.

All the foregoing observations are, as will be seen, entirely consistent with the rule, that an obligation to account will support no common-law action, except an action of account; and that rule is believed to be subject to no exception whatever.

Undoubtedly, the distinction between a debt and an obligation

to account is one which there is some danger of losing sight of, and this danger has been much increased by the disuse of the action of account. Moreover, this distinction has been much obscured by the prevalence of the *indebitatus* count in assumpsit for money had and received. That count, indeed, seems to have been framed in entire forgetfulness that any such distinction existed, for it alleges a legal impossibility, namely, that the defendant is indebted to the plaintiff for money had and received by the defendant *to the plaintiff's use*. If, in truth, the defendant is indebted to the plaintiff for money had and received by the defendant, it follows that the money was received by the defendant to his own use; and if the money was in truth received by the defendant to the plaintiff's use, it follows that it is the plaintiff's money, and that the defendant is accountable for it. And yet this inconsistency in the language of the count has never attracted attention. Less mischief, however, has resulted from it than might have been anticipated; for English lawyers, acting with their usual practical good sense, have treated the count as alleging an indebtedness for money had and received, and the words "to the plaintiff's use" have been disregarded. Much looseness of ideas prevailed, indeed, during the time of Lord Mansfield, and doubtless the instances have been numerous since his time in which assumpsit for money had and received has been allowed where account was the only proper action. The distinction between these two actions has, however, generally been recognized and maintained whenever attention has been properly called to it, and especially whenever substantial rights depended upon it. Thus in Lincoln *v.* Parr,[1] the court "declared their opinion that no evidence of account will maintain *indebitatus*, as on money delivered to a factor, who often have discharges of greater value, and so involve the court, which they will not allow"; "and it was said so to be ruled in Guildhall last sitting." In Sir Paul Neal's Case,[2] it was decided by all the judges of England that case would not lie against a bailiff, where allowances and deductions are to be made, unless the account had been adjusted and stated; and in Farrington *v.* Lee[3] the same doctrine was held in regard to a factor; and, in the latter case, North,

[1] 2 Keb. 781.

[2] Cited by North, C. J., in Farrington *v.* Lee, Freem. 230.

[3] 1 Mod. 268, 2 Mod. 311, Freem. 229, 234, 242.

C. J., said,[1] "If, upon an *indebitatus assumpsit*, matters are offered in evidence that lie in account, I do not allow them to be given in evidence." In Anonymous,[2] Powell, J., having said, "If I give money to another to buy goods for me, and he neglects to buy them, for this breach of trust I shall have election to bring debt or account," Holt, C. J., answered, "If the party did not take it as a debt, but *ad computandum* or *ad merchandisandum*, it must be an account, and he shall have the benefit of an accountant; which is, he may plead being robbed, which shall be a good plea in the last case, but not in the first." In Poulter *v.* Cornwall[3] it was virtually admitted by the court that a count in *indebitatus assumpsit* for money had and received by the defendant *ad computandum* was bad on demurrer. Finally, in Thomas *v.* Thomas[4] it was held, upon great consideration, that *indebitatus assumpsit* for money had and received would not lie by one tenant in common against his co-tenant, to recover the plaintiff's share of rents received by the defendant for the land held in common. In order to appreciate the force of this decision, it must be borne in mind that the plaintiff would have had no remedy at all at common law, unless he had appointed the defendant as his bailiff of his share of the land; that, without such an appointment, not even an action of account would have lain, for want of privity; but that the want of privity had been supplied by statute,[5] and hence that the defendant was liable as the plaintiff's bailiff, just as if he had been actually appointed. The decision was, therefore, to the effect that *indebitatus assumpsit* for money had and received will not lie against a bailiff to recover money received by him as bailiff.

Allowing *indebitatus assumpsit* for money had and received to lie upon an obligation to account, involves one of two false assumptions, namely, either that such an obligation constitutes a debt, or that such an action will lie, though there be no debt. If the first

[1] 1 Mod. 268, 270.

[2] 11 Mod. 92.

[3] 1 Salk. 9. Though the decision in this case was in the plaintiff's favor, yet it was rendered on a motion in arrest of judgment, and was based entirely on the ground that the declaration was cured by the verdict, "for it must be intended there was proof to the jury that the defendant refused to account, or had done somewhat else that had rendered him an absolute debtor."

[4] 5 Exch. 28.

[5] 4 Anne, ch. 16, s. 27.

assumption be made, the defendant will be deprived of the defence that the fund has been lost without his fault; and he will also be deprived of the defence that the fund, or some portion of it, has been expended by the defendant for the plaintiff and by the plaintiff's authority; unless another false assumption be made, namely, that money paid by the defendant out of the fund constitutes a debt in his favor, and so a defence by way of set-off or counter-claim. If the false assumption be made that *indebitatus assumpsit* for money had and received will lie upon an obligation to account, though such an obligation constitute no debt, that is equivalent to saying that such action shall be allowed to perform the function of an action of account, or of a bill in equity for an account. If the reader ask why not, and be not satisfied with the answer that to allow this would be to allow a plaintiff who has alleged one thing to recover upon proving a wholly different thing, it may be added, first, that nothing whatever would be gained by such a perversion of remedies; that the action of account eventually proved a failure, not because it was badly or defectively constructed, but because it attempted to accomplish what was beyond the powers of common-law courts; secondly, that the enforcement of an obligation to account necessarily involves two successive stages of litigation, with two sets of pleadings and two trials; and that only the first of the two trials is before a jury, even at common law, the second being before judicial officers, namely, before auditors. To attempt, therefore, to enforce such an obligation by an action which has but one stage of litigation, but one set of pleadings, and but one trial, would be not only to involve the court in incredible confusion in point of procedure, but to compel the defendant to account before an incompetent and illegal tribunal, namely, a jury. Yet this seems to have been the idea of Lord Mansfield, if we may judge from the case of Dale *v.* Sollet.[1]

[1] 4 Burr. 2133. The defendant in this case had collected £2,000 for the plaintiff as the plaintiff's agent, and he had paid over to the plaintiff all but £40, which he claimed to retain as a compensation for his services. This latter sum the plaintiff sought to recover in an action of assumpsit for money had and received. The defendant having pleaded only the general issue, the plaintiff objected that, upon that issue, the defendant could not avail himself of his right of retainer, but that he should have pleaded his claim for services as a set-off. This objection, however, was overruled, Lord Mansfield saying: "The plaintiff can recover no more than he is in conscience and equity entitled to: which can be no more than what remains after deducting all just allowances which the defendant

The next question is, What is the jurisdiction of equity over obligations to account? The action of account seems to have proved a failure before any regular system of equity was established. Certainly equity never regarded that action as an adequate remedy, and therefore it always permitted an obligation to account to be enforced by bill. At first, therefore, and for a long time, courts of equity had (what is improperly called) a concurrent jurisdiction with courts of law over obligations to account. Actions of account were for a time revived to some extent in England during the present century, but, with that exception, they have been constantly on the decline; and now, so far as the writer is aware, they are everywhere either abrogated or wholly obsolete. Obligations to account now therefore furnish an instance of an important legal right with no legal remedy whatever, and hence the sole remedy is in equity. A bill in equity for an account, therefore, is simply a substitute for the action of account.

The proceedings upon a bill for an account are similar, in their main outline, to those in an action of account. Of course there are all those differences which distinguish all proceedings in a suit in equity from those in an action at law, but such differences do not require to be noticed here. The question whether the defendant is bound to account is, of course, heard by a judge, instead of being tried by a jury. If, however, this question should be found to turn upon controverted facts, it would seem to be the right of either party to have it sent to a court of law to be tried by a jury.[1] If it be decided that the defendant shall account, the court makes a decree, referring the cause to a master to take the account, instead of appointing auditors as at law.

If, upon the accounting, the defendant be found to be in surplusage to the plaintiff, he is entitled to a decree against the plaintiff for the balance due to him. This is upon the same principle upon which the defendant may have a decree in his favor upon a bill for specific performance, and which has been already explained.[2] It would seem to follow, therefore, that a

has a right to retain out of the very sum demanded. This is not in the nature of a cross-demand or mutual debt: it is a charge, which makes the sum of money received for the plaintiff's use so much less." There is but one criticism to be made upon this very characteristic language, namely, that the action was *indebitatus assumpsit*, — not account.

[1] Note to Holstcomb *v.* Rivers, 1 Eq. Cases Abr. 5.

[2] See Vol. I. pp. 361, 362.

person subject to an obligation to account, and who claims to be in surplusage to the obligee, may himself file a bill against the obligee to have his accounts taken, and to have a decree for the payment of such balance as shall be found to be due to him;[1] for otherwise he would seem to be without remedy, in case the obligee do not choose to file a bill.

A defendant to a bill for an account, as well as a defendant in an action of account, may account fully by showing that all the property for which he was accountable has been sold, and its proceeds received; that, upon receiving such proceeds, he was entitled to appropriate them to his own use, debiting himself and crediting the plaintiff with their amount, and that he did so; but the consequences of such an accounting upon a bill for an account are different from what they are in an action of account; for, while in the latter, as we have seen, the plaintiff can obtain nothing but the accounting, and must bring a separate action of debt or *indebitatus assumpsit* to recover the debt, upon the former, the accounting will be followed up by a decree for the payment of the debt; and this is done for the purpose of avoiding a multiplicity of actions, equity never sending a plaintiff to a court of law to finish what equity has begun.

It remains to inquire against what classes of persons a bill for an account will lie. The two most ancient as well as most typical classes are guardians (including committees of lunatics and other persons of unsound mind), and agents, stewards, or bailiffs of landed estates.[2] Bills against the first of these two classes are much less common in this country than in England, as such persons in this country more frequently settle their accounts in probate courts or in other inferior and local courts. Bills against the second class of persons are also much less numerous in this country than in England, because such persons are themselves

[1] There is, however, a singular dearth of authority upon the proposition stated in the text. In Dinwiddie *v.* Bailey, 6 Ves. 136, the plaintiff's counsel said (p. 139): "There have been many bills of this nature [*i. e.*, bills for an account] by stewards for an account between them and their employers, as to receiving rents and paying sums of money. The defendants must make out that the court will not entertain a bill for an account at the suit of an accounting party." Though the decision was against the plaintiff, and though no authority was cited in support of the statement that there had been many bills for an account by stewards, yet the accuracy of that statement was not questioned either by Lord Eldon or by the defendant's counsel.

[2] Makepeace *v.* Rogers, 4 De G., J. & S. 649.

much less numerous. In England, much the greater part of all the landed property in the kingdom is managed by such agents. They reside upon the estate for which they are agent, have an office or counting-house, keep a set of books, and represent the owner of the estate in all business transactions between him and his tenants. As agents they keep an account with their banker, to the credit of which they deposit all rents collected from the tenants of the estate, and against which they draw cheques in payment of all expenses incurred on behalf of the estate. What remains represents the net income of the estate, and of course belongs to the owner of the estate; and any mixing by such agents of the owner's money with their own is a fraud on their part.[1]

The largest and most important class of persons, however, against whom bills for an account will lie, are agents who make it their business, or at least a part of their business, to receive the property of others into their possession for the purpose of selling it, and who are paid for their services by a fixed commission on the proceeds of sales made by them. Agents of this class comprise, not only factors or commission merchants,[2] but auctioneers [3] (*i. e.*, when they receive into their own possession the property to be sold by them), stock-brokers [4] (*i.e.*, when employed to sell stocks, shares, or securities), bill-brokers or note-brokers,[5] employed to sell bills of exchange or promissory notes, and book-publishers [6] (*i. e.*, when they publish a book for its author, and sell it for him on commission).

It may be regarded as clear that all agents of the kind just referred to have a right, when they receive the proceeds of property sold by them, to appropriate such proceeds to their own use, debiting themselves and crediting their principals with the amount

[1] See Salisbury *v.* Cecil, 1 Cox, 277.

[2] Mackenzie *v.* Johnston, 4 Madd. 373.

[3] Commonwealth *v.* Stearns, 2 Met. 343.

[4] It seems therefore that, in King *v.* Rossett, 2 Y. & J. 33, the plaintiff was entitled to an account of the stock sold by the defendants for him. *See infra*, n. 6.

[5] Commonwealth *v.* Foster, 107 Mass. 221.

[6] It seems therefore that, in Barry *v.* Stevens, 31 Beav. 258, the plaintiff was entitled to an account. In that case, as in King *v.* Rossett, *supra*, if there was thought to have been no good reason for filing the bill, the court could have met the justice of the case by requiring the plaintiff to pay costs. In each case, the plaintiff's chief object probably was to obtain an injunction against an action at law brought by the defendant to recover a balance claimed to be due to him; and clearly the plaintiff was not entitled to that in either case.

so received and appropriated.[1] The business of such agents is uniformly conducted on the theory that they have such a right, and it would not be practicable for them to conduct it on the opposite theory; for if they were bound to regard the proceeds of all goods sold by them as belonging to the owner of the goods, it would be necessary for them to open a separate bank-account for every customer. This right, however, is strictly personal to the agent, and he may refrain from exercising it if he choose. It cannot be said, therefore, as matter of law, that the proceeds of every sale made by such agent become *ipso facto* the property of the agent the moment they are received by him. Still, there is a presumption that they do, because there is a presumption that the agent exercises his right of making them his own. Consequently the principals of such agents have a choice of two remedies for recovering the proceeds of their property sold by their agents; namely, a bill in equity for an account of the property sold, or an action of debt or *indebitatus assumpsit* for the recovery of the debt.[2] If there is a controversy as to the amount which the principal is entitled to receive, the former is the proper remedy; if there is not, the latter is abundantly sufficient.

What is said in the preceding paragraph, however, has no application to an agent who is specially employed to sell property, and not as a part of his regular business; for such an agent is accountable for the proceeds of the property sold as well as for the property itself.[3]

A stock-broker who is employed to buy stocks, shares, or securities is not accountable to his customer for the money received by him for the latter; for the course of business is for the broker to buy in his own name and on his own credit and responsibility, and to debit his customer with the price; and then, when the money is received from the customer, the latter is credited with the amount received. And even if the customer furnish the money in advance of the purchase, yet the course of business is the same, *i.e.*, the broker credits the customer with the amount

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[1] Scott *v.* Surman, Willes, 400; Dumas, *ex parte*, 1 Atk. 232, 234; Kirkham *v.* Peel, 44 L. T. Reports, N. S., 195; Commonwealth *v.* Stearns, 2 Met. 343. A different view was expressed by Lord Cottenham, in Foley *v.* Hill, 2 H. L. Cas. 28, 35, but it was entirely *obiter*.

[2] Wells *v.* Ross, 7 Taunt. 403.

[3] Commonwealth *v.* Foster, 107 Mass, 221.

received from the latter, and when the purchase is made, he debits him with the price; so that the relation between the two is never any other than that of debtor and creditor.

When a book is published and sold by the publisher on his own account, under an agreement by him with the author to pay the latter either a fixed sum for every copy sold, or a fixed percentage of the gross proceeds of sales, the publisher is not accountable to the author, for the books sold (and hence their proceeds) are the property of the publisher — not of the author; and the money payable to the latter is merely the price of his copyright in the books sold. The relation, therefore, between the publisher and the author in such a case is merely that of debtor and creditor. The same is true also of a manufacturer who works a patent, under an agreement with the patentee to pay him a royalty on all the patented articles manufactured and sold.[1] If indeed the author or the patentee were by the agreement entitled specifically to a share of the net proceeds of sales,[2] he would be a co-owner of such net proceeds with the publisher or manufacturer, and, as the agreement would establish a fiduciary relation between the former and the latter, the former would be entitled to an account and payment of his share.

An insurance broker, according to the practice at Lloyds, is not accountable to his principal for money received by him from underwriters in payment of losses; for the broker effects all insurances on his own responsibility, crediting the underwriters and debiting the assured with the amount of the premiums; and, when a loss happens, he debits the underwriters and credits the assured with its amount. The broker therefore deals as a principal both with the underwriter and with the assured, and his relation with each is simply that of debtor and creditor; and the underwriter and the assured are strangers to each other.[3]

The relation between a banker and his customers is so plainly that of debtor and creditor, that one is surprised at finding that the former was ever supposed to be accountable to the latter; and yet a case was carried to the House of Lords mainly on that question.[4] Money deposited by a customer with his banker must

[1] Moxon *v.* Bright, L. R. 4 Ch. 292.

[2] Such was the fact in the late case of Pratt *v.* Tuttle, 136 Mass. 233.

[3] Dinwiddie *v.* Bailey, 6 Ves. 136.

[4] Foley *v.* Hill, 2 H. L. Cas. 28.

either become the banker's own money or it must be a special deposit in his hands; and in neither case would the banker be accountable for the money, for in the one case he would be a mere debtor, and in the other he would be a mere bailee.

Co-owners of property as such are not accountable to each other. Before the statute of 4 Anne, c. 16, s. 27, if land, owned (*e. g.*) by two persons in equal but undivided shares, was under lease, and one of them received all the rent without the authority of the other, the other had no remedy at law, for want of privity; and, though he had a remedy in equity, it was by a bill in the nature of a bill for partition, and not by a bill for an account. If he received the other's share of the rent by his authority and appointment, he was bound to account for it to the latter as the latter's bailiff. If the property was not under lease, and one of the co-owners alone occupied it, he might occupy the other's share as his bailiff, or he might occupy alone, simply because the other did not occupy, or he might exclude the other. In the first of these cases, the one occupying was bound to account with the other as his bailiff for the profits of the other's half of the property.[1] In the second case, the one occupying was not liable to the other in any way, either at law or in equity.[2] He was not accountable to the other, not only for want of privity between them, but also because he had received nothing belonging to the other. In the third case, the one occupying was liable to the other for a tort, but of course he was not accountable to him. In only two of the five cases just stated, therefore, could either an action of account or a bill for an account be maintained before the statute. In which of the other three cases did the statute enable the action and the bill to be maintained? Only in the first of the five. Why in that? Because the only obstacle before the statute was want of privity, and that obstacle was removed by the statute.[3] Why not in the last but one of the five? Because in that case there was an additional obstacle which was not removed by the statute, namely, that the defendant had *received* nothing belonging to the plaintiff, and

[1] It is on this principle that the managing owner of a vessel (called the ship's husband) is accountable to his co-owners. Maclachlan, Merchant-Shipping (2d ed.,) 175; Davis *v.* Johnston, 4 Sim. 539.

[2] "Two joint-tenants; the one takes the whole profits; no remedy for the other, except it were done by agreement or promise of account." Anon., Cary (ed. of 1820), p. 29, June 8, 1602, 44 Eliz.

[3] See Thomas *v.* Thomas, 5 Exch. 28.

hence that he had not, in the words of the statute, received more than came to his just share or proportion.[1]

If one of two co-owners of property authorize the other to sell his share and receive the proceeds of the sale, and the latter do so, of course he will be accountable to the former for the share sold; and the case will not be altered if the one who receives the authority sells the entire interest in the property, *i. e.*, his own share as well as the other's share; for he will then make the sale in two capacities, *i. e.*, he will sell his own share as owner and the other's share as the other's agent. It is on this principle that, when a merchant in one country consigns goods to a merchant in another country to be sold on the joint account of the consignor and the consignee, the latter is accountable to the former for the former's share of the goods. Such a transaction is commonly known as a joint adventure. The consignee acts for himself as to his own share of the goods, and as the other's factor as to the other's share.[2]

If one of two co-owners of property sell the property without any authority from the other, the sale will be effective as to his own share only (and hence the other co-owner will not be affected by the sale),[3] unless the property be of a kind which passes by delivery, and as to which possession proves ownership, *e. g.*, money or negotiable securities. If the property be of this latter kind,

[1] Eason *v.* Henderson, 12 Q. B. 986, 17 Q. B. 701; M'Mahon *v.* Burchell, 2 Ph. 127.

[2] Hackwell *v.* Eastman, Cro. Jac. 410, 1 Rol. Rep. 421; 1 Vin. Abr., Account (E), pl. 2, note. In such cases the consignor often incurs, in the first instance, the entire expense of the consignment, purchasing the goods with his own money or on his own credit, or furnishing them out of his own stock, and debiting the consignee with one half of the cost in the one case, and of the value in the other, as well as with one half of the incidental expenses of the consignment incurred by the consignor. Under such circumstances, therefore, the consignee incurs a double liability to the consignor, *i. e.*, he becomes *indebted* to him for his own half of the goods, and *accountable* to him for the consignor's half. Such were the circumstances in Baxter *v.* Hozier, 5 Bing. N. C. 288; and all the difficulties in that case arose from not attending to the distinction just stated. In fact, the consignors misconceived their remedy. Instead of bringing an action for an account of their own share of the goods (as to which there was no controversy), they should have brought an action of debt or of *indebitatus assumpsit* to recover payment for the consignees' share, the latter claiming that the goods were consigned to them, not on the joint account of the consignors and themselves, but solely as the factors of the consignors.

[3] "It was holden clear upon the evidence that if two men buy corn jointly, as barley or the like, the one shall not have account against his fellow for the disposal of this." Michael Dent's Case, Clayton, 50, August, 13 Car. I, *coram* Berkeley, J. But see the observations of Willes, C. J., in Wheeler *v.* Horne, Willes, 208, 209.

and hence the title of the other co-owner is divested by the sale, he will be entitled to the same share of the proceeds of the sale that he had in the property before the sale; and, therefore, he can maintain a bill for a division of such proceeds; but he cannot, even in that case, maintain a bill for an account for want of privity, the statute of 4 Anne, c. 16, s. 27, being, it seems, not applicable to such a case.[1]

Copartners differ from co-owners in this respect, among others, that, while one of two co-owners is sometimes accountable to the other, one of two copartners never is. The reader may be surprised at this statement, but it is believed to be strictly true.[2] There are insuperable objections to a bill for an account by one of two copartners against the other. First, the property of which an account is sought is as much in the possession of the plaintiff as of the defendant. Secondly, the plaintiff is neither the sole owner of the partnership property, nor the owner of any fixed share of it. What, then, shall he have an account of? Thirdly, if one of two copartners is accountable to the other, the other, *pari ratione*, is accountable to him; and hence we have two persons accountable to each other for the same thing and at the same time. Fourthly, an account by one of two copartners with the other will establish nothing, nor produce any result, unless the other also account with him. The truth is, the ordinary bill by one or more partners against the other or others is not a bill for an account, but a bill for the partition or division of the partnership assets among the partners; and this explains the fact that such a bill cannot be maintained without a dissolution of the partnership.[3] In order to ascertain how the assets shall be divided, there must, indeed, be an accounting (so called); but it is an accounting between each partner, on the one hand, and the firm, considered as a distinct person, on the other hand; and the relation between the several partners and the firm is that of debtor and creditor, and is not a relation created by an obligation to account.

The relation between a commercial traveller and his employer is merely that of debtor and creditor, even though the former be

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[1] See Lindley, Partn. (4th ed.), p. 64.

[2] "No instance of an action of account brought by one partner against another is known to the writer." Lindley, Partn. (4th ed.), p. 1022, n. k.

[3] Roberts *v.* Eberhardt, Kay, 148, 157–8.

paid for his services by a commission on the sales made through him ;[1] but if, by the agreement, he were entitled specifically to a share of the proceeds of such sales, he could maintain a bill for an account.[2]

A trustee is obviously under an obligation to account with his *cestui que trust* for the trust property or its income; but this obligation is merely equitable, and therefore a bill by a *cestui que trust* against his trustee is never a bill for an account in point of jurisdiction.

An executor or administrator is under a legal duty to pay or deliver over the personal property of his testator or intestate, after payment of debts, to the legatees or next of kin, and the latter may maintain a bill to compel a performance of this duty; but such a bill is not a bill for an account. The reasons why it is not are several, but there is one which is alone sufficient in this connection, namely, that the jurisdiction over such bills was derived by equity from the canon or ecclesiastical law. If, however, a testator by his will give to A the proceeds of certain land which he directs his executor to sell, and the executor sell the same accordingly, and receive the proceeds, though there is no doubt that A can maintain a bill against the executor to recover such proceeds, it is not so clear what will be the true nature of such a bill in point of jurisdiction. The question depends upon whether the case would formerly have belonged to the common-law courts (in which case the remedy would have been an action of account), or to the ecclesiastical courts, the gift being regarded as a legacy. It seems to be pretty well settled that the former is the correct view.[3]

An attorney-at-law who collects money for a client is bound to pay it over to his client at the earliest opportunity; and in the mean time he must not mix it with his own money. A bill for an account will therefore lie against him. So, it seems, a sheriff is accountable to the judgment creditor for the proceeds of property levied upon and sold by the former under an execution.[4] In the case of a sheriff, however, as well as in that of an attorney, there is a summary remedy in the court out of which the execu-

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[1] Smith *v.* Leveaux, 2 De G., J. & S. 1.

[2] See *supra*, p. 262, and n. 2.

[3] Paschall *v.* Keterich, Dyer, 151 b; Barker *v.* May, 9 B. & Cr. 489. But see Anon., Dyer, 264 b; Dens *v.* Dens, 1 Bulstr. 153.

[4] Speake *v.* Richards, Hobart, 206; 1 Vin. Abr., Account (D), pl. 9.

tion issues, or of which the attorney is an officer, which renders an action or suit against either seldom necessary. Moreover, if an action or suit is to be brought, an action of *indebitatus assumpsit* will generally be more convenient than a suit in equity; and to render such an action available, it seems only necessary for the plaintiff to make a demand before suing.

A stakeholder is clearly not entitled to debit himself with the stakes received by him, and therefore he is accountable for them;[1] and, though here also an action of *indebitatus assumpsit* will generally be more convenient than a bill for an account, yet a previous demand ought to be a necessary condition of maintaining such an action.

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[*To be continued.*]

LIMITATIONS IMPOSED BY THE FEDERAL CONSTITUTION ON THE RIGHT OF THE STATES TO ENACT QUARANTINE LAWS.

I.

THE subject will be treated in the following order: —

(1.) The nature of quarantine laws, and their classification in our constitutional law. This involves

(2.) The nature of the police power, and its distribution in our system of government.

(3.) The limitations imposed by the Constitution upon the police power of the States, applicable to quarantine laws. Under this head will be considered the effect of the power of Congress to regulate commerce; upon the rights of the States to enact these laws; when State quarantine regulations become unconstitutional on account of the scope of their provisions, or the purposes of their enactment; and, lastly, the effect of quarantine legislation by Congress, and the actual legislation of Congress upon this subject.

The term "quarantine" is derived through the monkish Latin

[1] Baynton *v.* Cheek, Styles, 353.